Energy Coal Income Partnership 1981-1 *and* United Mine Workers of America. Case 9-CA-18796

30 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 25 July 1983 Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging seven employees who engaged in a strike during initial contract negotiations because of what they perceived as a lack of progress at the bargaining table. Relying on *R.C. Can Co.*,[1] the judge concluded that the strike was protected activity in support of union objectives, even though the Union opposed the strike before it began and attempted to end it afterwards. The Respondent excepts to this finding and we find merit in its exception.

The strike occurred during initial contract negotiations between the Respondent and the United Mine Workers, which had been certified as the exclusive bargaining representative for a unit of 19 employees. Negotiations had proceeded for 3 or 4 months, and, on 6 August 1982, the parties arrived at an interim agreement regarding seniority and layoffs and were on the verge of a final accord.

On 8 August, 2 days later, employee Blair called a meeting of unit employees to discuss feelings that, despite the interim agreement, negotiations were proceeding too slowly. The meeting was attended by unit members Meadows, Conley, H. McKenzie, Hughes, Helton, and Blair and the United Mine Workers' agent Baldwin. After some discussion, and against the specific recommendation of Baldwin, the employees voted unanimously to strike, and set up pickets at the mine complex that evening. Picketing continued for 2 days, despite the refusal of United Mine Workers to sanction the strike and their efforts to persuade the strikers to cease. Only after the Respondent secured a state court temporary restraining order did the strikers cease their activities. Thereafter, all of the participants were discharged. The Respondent admits that the reason for the discharges was the strike.

It has long been recognized that the rights of employees to engage in concerted activities protected by Section 7 of the Act are limited by the requirement under Section 9(a) that "[r]epresentatives designated . . . for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit. . . ." Thus, both the Board and the courts have held that our national labor policy of employee strength through organization "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees."[2] Consequently, to extend the protection of Section 7 to dissident activity would undermine the statutory system of bargaining through an exclusive representative, and place employers in the position of trying to placate self-designated minority groups, while at the same time attempting to meet the demands of the duly elected bargaining representative.[3]

This principle, however, is not absolute. The recognized exception is dissident activity which is in support of, and does not seek to usurp or replace, the certified bargaining representative.[4] The question, then, is whether "the action of the individuals or a small group [is] in criticism of, or opposition to, the policies and actions theretofore taken by the organization[.] Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish? If it is the former, then such divisive, dissident action is not protected. . . . If, on the other hand, it seeks to generate support for and an acceptance of the demands put forth by the union, it is protected . . . ." *NLRB v. R.C. Can Co.*, 328 F.2d 974, 979 (5th Cir. 1964), enfg. 140 NLRB 588 (1963).

The judge relied on the *Western Contracting* and *R.C. Can* cases in concluding that the strike here constituted protected activity. It is in his interpretation of these cases and the application of the standard set forth therein to the facts of this case that we find that the judge erred. *Western Contracting* involved a strike by employees over an issue which had been discussed by union and management during contract negotiations, but which the union was unsuccessful in obtaining for employees. A handful of dissatisfied unit members decided to

[1] 140 NLRB 588 (1963), enfd. 328 F.2d 974 (5th Cir. 1964).

[2] *NLRB v. Allis-Chalmers Mfg. Corp.*, 388 U.S. 175, 180 (1967).

[3] See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 58 (1975).

[4] See *Western Contracting Corp.*, 139 NLRB 139 (1962), enfd. 322 F.2d 893 (10th Cir. 1963).

strike over the issue some time thereafter, without consulting the union leadership. The strikers, however, received immediate support both from a majority of unit members and the union itself. The Tenth Circuit Court of Appeals upheld the Board's finding that the activity was protected, noting that the dispute was of long standing between the employer and the union, having been the subject of prior negotiations, and that the strike was clearly in support of rather than in derogation of the union's position on the issue.

R.C. Can concerned a "quickie" strike undertaken against the recommendation of the union, to encourage more rapid bargaining by the employer. Although the union did not initially approve of the strike, it did not repudiate the action, and it told the strikers their activity was protected, and rendered them assistance after the strike. The Fifth Circuit Court of Appeals affirmed the Board's ruling that the strike constituted protected activity, applying the "in support of" test set forth above.

Unlike both *Western Contracting* and *R.C. Can*, in the present case the Union was strongly opposed to a strike and so informed the dissidents both before and after their vote. The Union subsequently made persistent, although unsuccessful, attempts to persuade the strikers to quit the picket line. The "objective" discerned by the judge, unlike that in *Western Contracting*, had never been advanced by the Union. As the court in *NLRB v. Shop Rite Foods*,[5] noted, "If *R.C. Can* is not applied with great care it would allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining." So do we find here, and accordingly we shall dismiss the complaint.[6]

ORDER

The complaint is dismissed.

[5] 430 F.2d 786, 790 (5th Cir. 1970), enfg. 171 NLRB 1498 (1968).

[6] Member Dennis notes that the *R.C. Can* doctrine has not met with universal approval. See, e.g., *Lee A. Consaul Co. v. NLRB*, 469 F.2d 84 (9th Cir. 1972). As the instant case falls outside the *R.C. Can* standard, she finds it unnecessary to pass on the validity of *R.C. Can* itself.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. The complaint in this matter was issued on November 22, 1982.[1] The sole issue is whether a strike and picketing by a minority of bargaining unit employees, not sanctioned by the certified bargaining representative, are concerted and protected activities within the meaning of Section 7 of the National Labor Relations Act. The hearing was held before me at Paintsville, Kentucky, on March 22 and 23, 1983.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs submitted April 29, 1983, by counsel for the General Counsel and for the Respondent, I make the following

FINDINGS OF FACT

Energy Coal Income Partnership 1981-1 (the Respondent) is a partnership recognized by the laws of the Commonwealth of Kentucky, engaging in the mining and processsing of coal in Martin County, Kentucky. It admits and I find that it is an employer engaged in commerce within the meaning of the Act, and that the United Mine Workers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act. On April 16, the Board certified the following unit as appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All parts dispensing clerks, counter clerks, shipping and receiving clerks and inventory control clerks located at the Employer's central shop and jobs 11 and 13, and the reclamation and survey crew, but excluding production and maintenance employees, all other employees, and all professional employees, office clerical employees, guards and supervisors as defined by the Act.

After certification the Union entered into negotiations with the Respondent for a collective-bargaining agreement. As of August 6 there were about 19 members of the unit, 7 of whom had been laid off and 12 of whom were still working. At a negotiating session of the Union and the Respondent on Friday, August 6, it was agreed that a more senior employee, who had been laid off, would be recalled to replace a less senior employee, who had not been laid off. It was also agreed that future recalls would be on the basis of seniority, but this agreement was subject to termination upon, among other things, "the occurrence of any strike, picketing, work stoppage or interference with operations."

One of the unit members called a meeting at a local park on Sunday, August 8, which was attended by about half a dozen bargaining unit members and one union organizer. The employees discussed the failure of the Respondent to immediately advise the less senior employee involved in the agreement of the preceding Friday that he was to be laid off, and their general feeling that the Respondent was delaying the bargaining.[2] Contrary to the advice of the union organizer these employees, viz, Blair, Meadows, Conley, Helton, Hughes, and Harry McKenzie, decided to strike and to establish a picket line that evening. Though not at the meeting, Carol McKenzie later joined the others on the picket line. The avowed purpose of the strike and picketing was to encourage the Respondent's speedy conclusion of negotiations and

[1] All dates are in 1982 unless otherwise specified.

[2] There is no allegation of any violation of Sec. 8(a)(5) of the Act.

entry into a bargaining agreement with the Union. The Union did not sanction and it advised against both the strike and the picket line.

The picketing continued from Sunday evening until Tuesday afternoon, August 10, and disrupted operations at the mine. Pickets told questioners that the reason for the picket line was the lack of progress in contract negotiations. Though the Union made repeated attempts to end the picketing the line remained until the Respondent had obtained an injunction and the union representatives assured the picketers that there would be no retaliation against them.[3] Those picketing employees thereafter attempting to return to work, on August 11, viz Blair, Meadows, Conley, and Harry McKenzie, were given written notices of discharge for "unsatisfactory service." The Respondent admits, however, that these employees were discharged solely because of their participation in the strike and picketing.

On September 7, the Respondent recalled four of the seven employees who had been laid off prior to the strike, none of whom had been involved in the strike or picketing. Hughes, Helton, and Carol McKenzie, though more senior than any of the recalled employees, were not recalled. The Respondent admits that these employees were not recalled because of their strike and picketing activities.

Discussion

As stated in *NLRB v. Allis-Chalmers Mfg. Corp.*, 388 U.S. 175, 180 (1967):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization . . . [employees] have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees. . . . The employee may disagree with many of the union decisions but is bound by them.

The Board applied this principle where two dissident employees picketed, and ruled that:

> In sum, to extend the protection of the Act to the two employees named in the complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative . . . and place on the Employer an unreasonable burden of attempting to placate self-designated representatives while . . . attempting in good faith to meet whatever demands the bargaining representative [puts] forth . . . . [*The Emporium*, 192 NLRB 173, 186 (1971), affd. sub nom. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).]

These general principles were applied by the courts in a number of cases[4] and were also discussed by the General Counsel in an Advice Memorandum to Region 14.[5]

This general "majoritarian" principle, that dissident or minority employee action is not protected by the Act, had an exception established by a concurrent line of decisions. Where a spontaneous strike initiated by a minority faction concerned an issue over which the union had already protested, and the union and a majority of unit members quickly ratified the strike, the dissident minority action was accorded the protection of the Act. The rationale of the decision was that the originally unauthorized strike did not derogate from the position of the union as exclusive representative since the union was already protesting the involved issue.[6] The principle that minority dissident activities in support and not in derogation of the bargaining representative retains the protection of the Act was firmly established in another matter, where a work stoppage and picketing were undertaken by a minority of employees to expedite ongoing negotiations with the union. *NLRB v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964). The court phrased its finding as follows:

> In these conflicting policies, there may be found basis for resolution: is the action of the individuals or a small group in criticism of, or opposition to, the policies and actions theretofore taken by the organization? Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish? If it is the former, then such divisive, dissident action is not protected. . . . If, on the other hand, it seeks to generate support for and acceptance of the demands put forth by the union, it is protected. . . . [Id. at 979.]

All courts, however, have not been uniform in recognizing that unauthorized minority action warrants the protection of the Act where congruent with union objectives[7] and have warned that unless this exception is "applied with great care it would allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining."[8]

The Supreme Court has not ruled directly on this issue. *Emporium Capwell*, supra, was decided on the explicit understanding that the dissident minority was seeking to force the employer to bargain directly with them

[3] There is a dispute as to whether the Respondent ever stated that there would be no retaliation, but the truth of the various assertions is not an issue herein. Had the Union thought there would be retaliation by the Respondent it might have later sanctioned the strike, but this would not have altered the fact that the strike was originally instituted and that the picketing occurred at the instance of a minority of bargaining unit members, without union sanction, and contrary to the union desires.

[4] *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944); *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976); *NLRB v. Wilson Freight Co.*, 604 F.2d 712 (1st Cir. 1979); *NLRB v. American Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980); *Caterpillar Tractor Co. v. NLRB*, 658 F.2d 1242 (7th Cir. 1981).

[5] United States Postal Service, issued February 14, 1977, 95 LRRM 1537.

[6] *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963).

[7] *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954); *Lee A. Consaul Co. v. NLRB*, 469 F.2d 84 (9th Cir. 1972).

[8] *NLRB v. Shop Rite Foods*, 430 F.2d 786, 790 (5th Cir. 1970).

on the issue of racial discrimination, which would unlawfully disrupt the ongoing negotiations with the certified representative. The Board has continued to apply the *R.C. Can* rationale, supra, establishing an exception to the "majoritarian" principle. In *United Parcel Service*, 230 NLRB 1147, 1159 (1977), the Board afforded protection under the Act to activity which "was to influence the efforts of the employees' bargaining representative . . . and not as claimed by the Company, to disrupt the bargaining process or displace their bargaining representative."

Applying these criteria to the matter at hand, I find that the strike and picketing, though not sanctioned by a majority of the unit or by the Union, was in support of, and not an attempt to usurp or replace the certified bargaining representative. As such, I find that it constituted activity protected by Section 7 of the Act. The discharge of the named employees for engaging in the activities and the failure to recall the other named employees for engaging in the activities were therefore violations of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All parts dispensing clerks, counter clerks, shipping and receiving clerks and inventory control clerks located at the Employer's central shop and jobs 11 and 13, and the reclamation and survey crew, but excluding production and maintenance employees, all other employees, and all professional employees, office clerical employees, guards and supervisors as defined by the Act.

4. By discharging Gregory Blair, Greg Meadows, Jimmy George Conley, and Harry McKenzie on August 12, 1982, and by failing and refusing to recall employees Ken Hughes, George Helton, and Carol McKenzie on September 7, 1982, because of their participation in a strike and picketing in support of though not sanctioned by the Union, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discharged Gregory Blair, Greg Meadows, Jimmy George Conley, and Harry McKenzie, and failed to recall Ken Hughes, George Helton, and Carol McKenzie in violation of Section 8(a)(1) of the Act, I recommend that the Respondent be ordered to offer them reinstatement, and to make them whole for any loss of pay resulting from their discharge or failure to be recalled, by a payment of a sum of money equal to the amount of money they would have earned as wages from the date of the discharge or failure to recall to the date on which reinstatement is offered, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[9]

[Recommended Order omitted from publication.]

[9] See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).